Supreme Court, U.S.
JUL 20 1989

No. 88-2080

In The

Supreme Court of the United States

October Term, 1988

BOKUM RESOURCES CORPORATION,

Petitioner,

v.

LONG ISLAND LIGHTING COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF CASE

Respondent, Long Island Lighting Company (hereinafter referred to as "LILCO"), sets forth certain salient facts of this case because of certain inaccuracies and misleading statements in the Petition for a Writ of Certiorari. This case was commenced over seven years ago by Petitioner, Bokum Resources Corporation (hereinafter referred to either as "Petitioner" or as "BRC"), which was then, and still is, in bankruptcy. A Petition for Involuntary Reorganization was filed against Petitioner on June 12, 1981. At that time Petitioner had numerous unpaid creditors, many of whom had filed mechanics' and materialmen's liens against Petitioner's mining and milling properties. In addition, Petitioner was engaged in several lawsuits against contractors, stockholders and respondent.

Having no income and only two major assets, a uranium mill and mining leases which were pledged to LILCO, Petitioner filed a plan for reorganization on July 11, 1983 that was based on the outcome of its litigation. Thus, at the time of the trial of this case, Petitioner had already organized its affairs, several lawsuits or portions of lawsuits had been completed in Bankruptcy Court, the mechanics' and materialmen's liens had been resolved and the claims of all creditors, except for those of LILCO, had been settled or paid. Counterclaims brought against LILCO by Petitioner in another case had been decided in LILCO's favor and only two major pieces of litigation remained. One, this case, was a breach of contract action and the other was a mortgage foreclosure action, which has yet to be tried.

This petition involves only one lawsuit, not two, as Petitioner would have the Court believe. The complex procedural history surrounding the present case is not easily stated. An involuntary petition under Chapter 11 of the Bankruptcy Code was filed against Petitioner on June 12, 1981. Prior to the involuntary petition, controversies had arisen between Petitioner and LILCO as a result of LILCO's financing of Petitioner's mill and mine development project. As a result of these controversies, on November 10, 1980, LILCO commenced a mortgage foreclosure action against Petitioner in the United States District Court. Petitioner filed a counterclaim to the mortgage foreclosure action. When the involuntary petition was filed on June 12, 1981, the United States District Court stayed the mortgage foreclosure action. On June 29, 1982, the District Court entered an order removing the mortgage foreclosure pending before it, and all consolidated actions, to the Bankruptcy Court.

Subsequently, certain of Petitioner's counts in its counterclaim to the mortgage foreclosure action were tried before the Bankruptcy Court. These counts are not material to the pending petition. Later, the Bankruptcy Court granted summary judgment to LILCO on the remaining count in Petitioner's counterclaim and that issue was appealed to the District Court.

The case at bar is a breach of contracts case which arose involving two uranium concentrates purchase contracts (hereinafter referred to as the "1976 UCPC" and the "1978 UCPC"). The case was not pending at the time the Petition for Involuntary Reorganization was filed against Petitioner in June, 1981; rather, the original complaint was filed by Petitioner in February, 1982, in state court in

Cibola County, New Mexico, eight months after the commencement of bankruptcy. The case was removed to Bankruptcy Court on March 23, 1982. LILCO filed a timely answer in Bankruptcy Court. LILCO also responded to Petitioner's complaint with several compulsory counterclaims, one of which was for the return of $20,000,000 which had been advanced to Petitioner under the terms of the contracts which Petitioner had alleged were breached and another was for foreclosure of certain mining leases which had been pledged to LILCO as security for Petitioner's performance under the contracts.

Petitioner and its bankruptcy attorney were not unaware of the counterclaims brought by LILCO in this lawsuit. On April 12, 1982, a pretrial conference was held in Bankruptcy Court, and LILCO's counterclaims were discussed. However, Petitioner did not ask that the automatic stay be applied against the counterclaims at issue here. In 1985, Petitioner filed an amended complaint in the Bankruptcy Court; on August 5, 1985, LILCO filed an answer to the amended complaint and counterclaims and served Mr. Puccini, Petitioner's bankruptcy counsel, and Petitioner's litigation counsel. On August 27, 1985, Petitioner filed in Bankruptcy Court its reply to LILCO's counterclaims. Numerous pretrial hearings were held before the Bankruptcy Court in this case. At some of the pretrial hearings LILCO's counterclaims were discussed, yet at no time over the past seven years did counsel for Petitioner assert that the counterclaims should not proceed.

At a pretrial hearing held on April 14, 1984, the Bankruptcy Court determined that it would hear all pretrial issues and motions and that discovery would continue in the Bankruptcy Court. The Bankruptcy Court in May 1985 ruled that the case at bar was a non-core proceeding which should be tried by a jury in United States District Court for the District of New Mexico and recommended that the reference of the case be withdrawn. LILCO moved for summary judgment in September 1985, asking that the Bankruptcy Court dismiss Petitioner's breach of contracts case. This motion was denied. LILCO appealed that decision to the District Court.

Petitioner has stated that the mortgage foreclosure proceeding commenced by LILCO which had been pending at the time of the commencement of the BRC bankruptcy, *Long Island Lighting Co. v. Bokum Resources Corp.*, U.S. Bankruptcy Court for the District of New Mexico, Adversary No. 82-0235; D.N.M. CIV. No. 85-860, was consolidated and tried with the case at bar. This is an incorrect assertion. The trial court consolidated for appeal LILCO's appeal from the denial of its motion for summary judgment on Petitioner's breach of contract action and Petitioner's appeal of the granting of LILCO's motion for summary judgment on one count of Petitioner's counterclaim to LILCO's mortgage foreclosure proceeding which raised an issue that is no longer relevant to the proceedings at bar. Neither of these appeals before the District Court dealt with LILCO's counterclaim seeking foreclosure on the mining lease in response to Petitioner's allegation of breach of contract. Furthermore, the appeal itself did not involve the merits of LILCO's

mortgage foreclosure proceeding, but rather involved only one of Petitioner's counterclaims filed in response to LILCO's action for mortgage foreclosure. LILCO's mortgage foreclosure action is still pending before the Bankruptcy Court, has never been adjudicated and, contrary to the assertions made by Petitioner, was not tried with the case at bar.

Because the procedural history of this case is complex and confusing, we have included a Summary of Status prepared by Petitioner, BRC, for the Bankruptcy Court on April 18, 1986, as Appendix 1. The summary demonstrates that LILCO's mortgage foreclosure proceeding in Adversary No. 82-0235 was deferred until all other matters between LILCO and Petitioner were resolved. The counterclaim LILCO filed in response to Petitioner's complaint in the instant case is entirely different from LILCO's mortgage foreclosure proceeding and indeed does not even involve the same property.

Petitioner's third point relies on matters not of record and fails to inform this Court of critical procedural events. There is no evidence that had LILCO paid for tendered uranium that Petitioner could have gotten out of bankruptcy. Further, Petitioner omits the fact that it waived the jury's determination of fact regarding LILCO's counterclaim and agreed that the court could hear those claims as a trier of fact. Petitioner's waiver of the right to have the jury hear the counterclaim is the lynchpin in the Tenth Circuit's decision to affirm. As was admitted by Petitioner's counsel in the argument before the Tenth Circuit, if there was evidence to support the trial court's decision on the counterclaim, then the court's findings would control Petitioner's claims as well.

SUMMARY OF ARGUMENT

Point 1 responds to Petitioner's Questions 1 and 2 and makes the point that Petitioner has never previously raised an issue concerning the automatic stay. Point 1 further demonstrates that where a counterclaim is filed in the bankruptcy proceedings in response to a suit brought by the debtor, the automatic stay does not bar trial of the counterclaim. Further, where the bankruptcy judge and the District Court which tried the case are both fully familiar with the proceedings and where there is no harm to the interests of creditors and the debtor which the automatic stay seeks to protect, the automatic stay should not be used after the fact to upset a judgment. Finally, Point 1 demonstrates that there is no basis for granting the writ because the cases on which Petitioner relies to show a conflict have no bearing on the case at bar.

Point 2 responds to Petitioner's Question 3 and demonstrates that the question presented is not the sort that justifies issuing a writ of certiorari. The issue does not involve a conflict among the circuits nor an important issue of federal law. The issue is a routine procedural matter – a directed verdict – in a routine contracts case. Furthermore, the Petitioner's waiver of the jury on the counterclaim leads to the position that if the findings are not clearly erroneous, then the findings are law of the case and Petitioner cannot submit claims to a jury which would necessarily result in conflicting determinations if the jury found in his favor.

ARGUMENT

1. No writ should issue where Petitioner has failed to raise an issue concerning the automatic stay in any prior proceedings and where the counterclaims were filed in the bankruptcy proceedings so that the automatic stay does not preclude trial of the counterclaims with Petitioner's breach of contract claims which arose out of the same transactions. (Response to Questions 1 and 2)

Petitioner candidly admits that the first two questions presented have never been raised before. Not once during pretrial proceedings before the Bankruptcy Court nor during the trial of this case before the District Court did Petitioner suggest that proceeding to hear the counterclaims would be a violation of the automatic stay provisions. Never in the Court of Appeals – not in its brief, reply brief, oral argument or petition for rehearing – did the Petitioner mention the issues raised in its first two questions. Petitioner's previous silence, in and of itself, should lead this Court to refuse to issue the writ.

On numerous occasions this Court has observed that where the grounds presented in this Court have not been raised below, this Court will consider such grounds only in "exceptional" cases. *See, e.g., Heckler v. Campbell,* 461 U.S. 458 (1983). The "normal practice" of this Court is "to refrain from addressing issues not raised in the Court of Appeals." *E.E.O.C. v. Federal Labor Relations Authority,* 476 U.S. 19, 24 (1986). There is no reason to refrain from the normal preservation requirements in the present case.

While there is not much authority dealing with the need to raise below an issue concerning a stay, what authority there is states that issues should be presented to

the Bankruptcy Court, the District Court, and to the Appellate Court. *See First Nat'l Bank of Denver v. Turley*, 705 F.2d 1024, 1026 (8th Cir. 1983).

No miscarriage of justice will arise if the normal practice is followed in this case. The record below makes it clear that the bankruptcy judge and the district judge were well aware of the proceedings in bankruptcy. Both judges realized that the counterclaims would be tried. The purpose of the automatic stay is "to protect the debtor and his creditors by allowing the debtor to organize his affairs, and by ensuring that the bankruptcy procedure may operate to provide an orderly resolution of all claims." *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987). *See also Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 503 (1986). The bankruptcy judge suggested that reference of this case should be withdrawn so that the District Court could try the matter. The bankruptcy judge made the suggestion after full consideration of all pretrial matters, including summary judgment motions. The District Court which originally referred the claims to the Bankruptcy Court had complete familiarity with the entire scope of the proceedings before the bankruptcy judge. Thus, orderly resolution of the bankruptcy proceedings was not diminished by permitting the counterclaims to proceed. Permitting trial of the counterclaims did not hurt creditors because, apart from LILCO, there are no creditors of any magnitude. Finally, the debtor's own failure, during the seven years the matter has been pending, to raise an issue concerning the stay demonstrates the lack of harm to it.

The futility of Petitioner's position is further demonstrated by the result which would follow from granting

Petitioner relief. Lifting an automatic stay can be accomplished retroactively. *See In re Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir. 1984). Thus a remand from this Court to the very court which directed that the counterclaims be tried would result in nothing more than a lifting of the stay retroactively. There simply is no prejudice to the debtor where the creditor would have obtained relief from the stay had it been requested. *See In re Charter Co.*, 86 Bankr. 280, 283 (Bankr. M.D. Fla. 1988). Not only was the very judge who would have decided whether to lift the stay the judge who sent the counterclaims to the District Court for trial, but also all the considerations which militate in favor of lifting the stay were present. Thus "[w]here neither prejudice to the bankruptcy estate nor interference with the bankruptcy proceeding is demonstrated," the stay should be lifted. *In re Larkham*, 31 Bankr. 273, 276 (Bankr. D. Vt. 1983). Neither prejudice to the estate nor interference with the proceeding resulted from trying the counterclaims in the case at bar.

None of the cases cited by Petitioner stand for the proposition that a debtor should be allowed to participate in proceedings in the Bankruptcy Court, in the District Court and in the Court of Appeals without ever mentioning the automatic stay and then claim error for the first time in a petition for writ of certiorari. None of the cases cited by Petitioner even deal with comparable factual circumstances. In each case cited, the debtor had litigation pending against it at the time it filed bankruptcy and the issue was what effect the automatic stay provisions would have on the already commenced litigation. Cases like *Association of St. Croix Condominium Owners v. St.*

Croix Hotel Corp., 682 F.2d 446 (3d Cir. 1982), which recognized that an appellate court could *sua-sponte* consider the impact of automatic stay provisions on an appeal of an action originally brought against a debtor, have nothing to do with the present case. In *St. Croix* the bankruptcy proceedings were initiated after the trial was completed but before the appeal was finalized.

In the present case, unlike *St. Croix*, the bankruptcy proceedings were begun some eight months prior to the debtor's filing a breach of contract claim in state court. LILCO removed the case to the United States District Court which referred the matter to Bankruptcy Court, and therein LILCO filed its counterclaims which arose out of the same transactions which were the subject of claims brought by, not against, Petitioner. This case is procedurally distinguishable from *St. Croix* and is comparable to *In re American Spinning Mills, Inc.*, 43 Bankr. 365 (Bankr. E.D. Pa. 1984), wherein the court noted that a "stay implicitly does not bar a party from commencing an adversary or contested proceeding against the debtor under the caption of the bankruptcy case in the court where the petition is pending." *Id.* at 367. As *American Spinning Mills* stated:

> Since the case at bench was removed from state court to this court, a creditor may file a counterclaim here against the debtor without requesting relief from the automatic stay . . . .

Id.

It should be noted that regardless of what this Court does with respect to the questions presented in Petitioner's Questions 1 and 2, the judgment against Petitioner on its contract claims should stand. The automatic

stay provisions under Section 362(a) provide that entities may not proceed against a debtor once a petition has been filed, 11 U.S.C. § 362 (1982 & Supp. V 1987). Bankruptcy Rule 6009, however, permits a debtor to commence an action while under the protection of the automatic stay. Bankr. R. Proc. 6009. Therefore, Petitioner's action on its breach of contract claim properly proceeded to judgment regardless of the automatic stay; the judgment on those claims against BRC should stand.

In the present case, the debtor is using the stay provisions as a belated, last-ditch effort to avoid adjudication of its breach of contract. Such an offensive use of the automatic stay places the "debtor . . . in the position of assailant rather than victim, [and] the potential for abuse . . . is manifest." *Bohack Corp. v. Borden, Inc.*, 599 F.2d 1160, 1168 (2d Cir. 1979). This Court should not countenance such abuse by issuing a writ of certiorari.

Petitioner has attempted to manufacture reasons for this Court to grant a writ. As Respondent has demonstrated, the cases on which Petitioner relies to assert a conflict in the circuits have no bearing on the case at bar. Further, there is no need for this Court to settle a question of law as requested by Petitioner because the rules cited by Petitioner have no application under the circumstances present in the case before the Court. For these reasons, the writ should not issue.

2. **The procedural ruling of a directed verdict on contract claims is an inappropriate issue for a writ, particularly when the findings on the counterclaim bar Petitioner's recovery. (Response to Question 3)**

Petitioner's third question fails to demonstrate that any grounds exist for issuing the writ. Petitioner's claim

is one which has no value to anyone other than Petitioner. The third question presented by Petitioner does not involve a conflict between the circuits or between state and federal courts. The issue presented does not involve a question of federal law which this Court should decide. The third question presented deals with a garden variety breach of contract claim and involves a routine procedural ruling on a motion for directed verdict.

Conspicuously missing from the petition is any mention of the parties' stipulation that LILCO's counterclaim be submitted to the trial court for determination. Nonetheless, the Tenth Circuit held that because of that action, if the findings were not clearly erroneous, then the findings would bar reconsideration of Petitioner's claims.

The District Court's findings on LILCO's counterclaims should not be overturned unless there is "the definite and firm conviction that a mistake has been made. . . ." *State Distributors, Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405, 412 (10th Cir. 1984). The evidence in support of the trial court's findings and conclusions is overwhelming, and they have not been challenged in this petition.

What the court below held, and what Petitioner conceded, was that if the District Court's findings of fact were upheld, using the clearly erroneous standard, they would control Petitioner's claims too as the law of the case. *See also McGhee v. Draper*, 639 F.2d 639 (10th Cir. 1981); *Demers v. Gerety*, 92 N.M. 749, 595 P.2d 387 (Ct. App.), *rev'd on other grounds*, 92 N.M. 396, 589 P.2d 180 (1978); 1B J. Moore, *Moore's Federal Practice*, § 0.404 [1] (2d Ed. 1988). Petitioner agreed to submit the counterclaims

to the court for a decision and is bound by the findings and conclusions thereon which were upheld on appeal and not challenged in the petition before this Court. Any future jury verdict in favor of the Petitioner on its claims against LILCO would necessarily be wholly inconsistent with the trial court's findings and conclusions regarding Petitioner's material breaches and inability to perform either the 1976 UCPC or 1978 UCPC.

Petitioner claims that LILCO breached the 1976 UCPC by failing to accept BRC's purported tender of August 10, 1981. In order for Petitioner to prevail on this claim, the jury would have to decide that Petitioner's tender was conforming and that Petitioner was not in material breach of the 1976 UCPC and could therefore demand that LILCO perform. Such findings by the jury would directly contradict the court's findings and conclusions entered on April 28, 1988.

Petitioner further argues that LILCO's rejection of Petitioner's purported tender amounted to an anticipatory repudiation of the remaining provisions of the 1976 UCPC and the 1978 UCPC. In order to find in Petitioner's favor on these claims, the jury would have to find that Petitioner was not in material breach of either the 1976 or 1978 UCPC; that LILCO's rejection of the August 10, 1981 purported tender substantially impaired the value of the contracts to Petitioner; that Petitioner requested adequate assurances of performance from LILCO; and that Petitioner intended to perform and was ready and able to perform. Again, a verdict based on such findings would be directly inconsistent with the trial court's findings and conclusions.

Any future verdict in favor of Petitioner on its claims against LILCO would directly contradict the trial court's findings and conclusions, which, since upheld, became law of the case. LILCO should not be made to run the risk of inconsistent determinations which is the precise jeopardy it faces if the case is remanded for a jury determination on any of Petitioner's claims after the court's findings and conclusions on the counterclaims have been upheld. Petitioner having stipulated to the submittal of the counterclaims and its encompassing issues to the court, and having failed to challenge the validity of those findings and facts and conclusions of law in its petition, cannot now be heard to seek a jury trial of the same issues.

With no issue of federal law and no conflict among the circuits, Petitioner has failed to establish an appropriate reason for issuing a writ in this claim. However, even if the Court was to consider Petitioner's claims, the inevitable conclusion is that Petitioner is bound by the trial court's findings of fact and conclusions of law on LILCO's counterclaim which Petitioner agreed to submit to the Court for determination. For these reasons, the writ should be denied.

CONCLUSION

For the reasons given above Petitioner has failed to present a case in which it would be appropriate to issue a writ. There are no conflicting circuit court decisions which deal with similar factual circumstances. The case does not involve important issues of federal law on which this Court should rule; the Court should deny the petition.

Respectfully submitted,

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APPENDIX 1

BOKUM RESOURCES CORPORATION
LONG ISLAND LIGHTING COMPANY
SUMMARY OF STATUS

This report summarizes the status of matters pending before the United States District Court for the District of New Mexico and the Bankruptcy Court for the District of New Mexico. An involuntary petition was filed under Chapter 11 on June 12, 1981. Bokum Resources Corporation presented a plan of arrangement on July 11, 1983. After modifications and hearings, this plan was approved, and, in general, has been completed. Under the plan, creditors were allowed to select whether to participate in cash distributions or participate in the recoveries, if any, from certain claims being pursued by Bokum Resources Corporation against others, including Long Island Lighting Company.

ADVERSARY PROCEEDING NO. 82-0202

Bokum Resources Corporation filed an action for damages for breach of certain agreements relating, among other things, to the delivery of uranium concentrates from Bokum Resources to Long Island Lighting. This case was filed in the District Court, McKinley County, New Mexico, on February 19, 1982.

This case was removed to the United States District Court by Long Island Lighting, and subsequently transferred to the Bankruptcy Court. Bokum Resources Corporation contended this was a non-core proceeding, and should be tried by a jury in the United States District Court. Judge Gueck agreed with Bokum Resources Corporation, and this case is pending before Judge Burciaga

in the United States District Court awaiting a jury trial, as District Court No. 85-860 JB. Long Island Lighting did not appeal the point that this was a non-core action which should be tried by the Federal District Court before a jury.

Long Island Lighting sought summary judgment on this case before Judge Gueck. He denied summary judgment. Long Island Lighting has sought to appeal the denial of summary judgment to Judge Burciaga. While not conceding a Bankruptcy Judge would be able to grant summary judgment in a non-core jury case, Bokum Resources has responded to this appeal by showing the appeal was not timely or specific as required by Local Rule 31(g). In any event, this entire matter is before Judge Burciaga in the United States District Court.

COUNT I OF COUNTERCLAIM ADVERSARY PROCEEDING NO. 82-0235

Long Island Lighting filed a foreclosure action against Bokum Resources in 1980, and Bokum Resources filed a counterclaim consisting of four counts. It was determined to resolve the counterclaim before the complaint. The case was originally in the United States District Court for the District of New Mexico, but removed to Bankruptcy Court.

Count I of the Counterclaim involves a claim that Long Island Lighting Company interfered with, and breached fidiciary duties owed Bokum Resources in connection with, agreements between Bokum Resources and a third party.

Judge Gueck determined this was a non-core case which was to be tried by a jury before Judge Burciaga in the United States District Court. Long Island Lighting did not appeal this question.

Long Island Lighting sought summary judgment, and Judge Gueck recommended that summary judgment should be granted to Long Island Lighting on Count I of the Counterclaim. Bokum Resources timely appealed this recommendation to Judge Burciaga. The resolution of this matter is pending before Judge Burciaga in the United States District Court as District Court No. 85-860 JB, and there appears to be nothing further for the Bankruptcy Court as to this matter.

COUNTS II, III AND IV OF COUNTERCLAIM ADVERSARY PROCEEDING NO. 82-0235

By stipulation, Counts II, III, and IV of the Counterclaim were tried before Judge Gueck without a jury. Judge Gueck determined these issues in favor of Long Island Lighting. Bokum Resources appealed to the United States District Court.

District Court Judge Burciaga remanded this action to Bankruptcy Court for certain determinations as to the standard of review on appeal by order dated February 4, 1985. A copy of Judge Burciaga's Order is attached. At a pretrial hearing, Judge Gueck requested that both parties submit their positions by letter by November 1, 1985. Bokum Resources submitted its position by letter dated November 1, 1985. A copy is attached. Bokum Resources has not received a letter from Long Island Lighting with

regard to this matter. Judge Burciaga's request is pending before the Bankruptcy Court.

FORECLOSURE ACTION
ADVERSARY PROCEEDING NO. 82-0235

This claim by Long Island Lighting against Bokum Resources was deferred until the claims by Bokum Resources against Long Island Lighting are determined. It is now in the Bankruptcy Court.